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No. 00-1618

IN THE

Supreme Court of the United States

Indeck Energy Services, Inc.,
and Indeck Saginaw Limited Partnership,
Petitioners,

v.

Consumers Energy Co. and
CMS Energy Corporation,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

Note: On May 16, the Sixth Circuit ordered that its decision in this case be published and accorded precedential status.

ARGUMENT

As demonstrated by the petition and the *amicus curiae* brief of the Michigan Attorney General, the decision below announces standards for applying "antitrust injury" and "antitrust standing" doctrines that conflict with decisions of this Court and other circuits. Respondent's contrary arguments – principally that the energy market is heavily regulated – are unavailing. Moreover, the question is of great importance because the decision below will impede the critical transition to free energy markets. Certiorari accordingly should be granted.[1]

I. Certiorari Should Be Granted to Review the Sixth Circuit's Antitrust Injury Holding.

1. This Court's precedents establish that (i) petitioner's complaint seeks damages for the anticompetitive aspects of respondent's activities, and (ii) petitioner accordingly has alleged "antitrust injury." There accordingly is no basis for respondent's bald assertion (BIO 15) that petitioner seeks to recover for "too much competition."

Petitioner's complaint alleges that petitioner was injured by respondent's refusal to provide reasonable access to essential transmission facilities and back-up power, and by respondent's further refusal to purchase power from petitioner in an effort to place petitioner in a price-cost squeeze. See Pet. 2-4.[2] Under this Court's precedents, those acts plainly are anti-, not pro-, competitive. See Pet. 15-16 & n.7 (collecting cases). Respon-

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[1] We reiterate the recommendation of the petition (at 1) that the reader would benefit substantially by first reviewing the bolded allegations of the complaint relating to antitrust injury and antitrust standing (see Pet. App. 42a-62a).

[2] Respondent's claim that "the principal focus" of petitioner's complaint was respondent's contracts with General Motors (BIO 1) is belied by the complaint (see Pet. App. 42a-62a) and, even if true, would lack legal significance.

dent asserts only (BIO 12) that these decisions did not involve any question of antitrust injury. That is not only wrong – see Pet. 16 (discussing the holding of *Kansas* v. *Utilicorp United Inc.*, 497 U.S. 199, 204 (1990), that "only the utility has the cause of action because it alone has suffered injury within the meaning of" the antitrust laws) – but it is also irrelevant. The point of those decisions is simply the uncontestable proposition that this Court has held that activities of the sort that underlie petitioner's claimed injury are anticompetitive.

Given that petitioner complains of the anticompetitive aspects of respondent's conduct, petitioner satisfies the "antitrust injury" requirement announced by this Court's precedents. The "antitrust injury" doctrine first announced in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat*, 429 U.S. 477 (1977), simply holds that an antitrust plaintiff's injury must be "attributable to an anticompetitive aspect of the practice under scrutiny." *Atlantic Richfield Co.* v. *USA Petroleum Co.*, 495 U.S. 328, 334 (1990). See also *Brunswick*, 429 U.S. at 489 ("The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation."). For example, even if a defendant's conduct violates the antitrust laws, a plaintiff is not permitted to recover for injuries arising from *enhanced* competition, such as the enhanced efficiencies produced by a merger that may reduce the plaintiff's income. Because petitioner's complaint does not seek recovery on such a basis – indeed, not even the *Sixth Circuit* suggested that it does – the conflict between the decision below and this Court's precedents is plain.

2. Although the Sixth Circuit acknowledged the *Brunswick* standard for alleging "antitrust injury," it nonetheless imposed *three* additional substantive requirements that conflict with the holding of this Court and other circuits that an "antitrust injury" is simply one that reflects the anticompetitive nature of the defendant's activities. Cf. *Major League Baseball Players Ass'n* v. *Garvey*, 121 S. Ct. 1724, 1728 (2001) (per curiam) ("To be sure, the Court of Appeals here recited these principles, but its application of them is nothing short of baffling.").

First, the Sixth Circuit held that an antitrust plaintiff must allege that the defendant's activities eliminated the plaintiff from the marketplace. Pet. 8. Respondent cannot, and does not, attempt to dispute this aspect of the court's holding. See Pet. App. 6a (requiring allegation of "exclusion of the competitor from the marketplace"), 8a (petitioner failed to allege "that all other unsuccessful bidders for Consumers Energy's business were driven out of the market").

Second, the Sixth Circuit held that an antitrust plaintiff must allege that the defendant's activities actually reduced competition. See Pet. 9; see also Pet. App. 7a (requiring allegation "that a less-than-arm's length transaction destroyed or damaged the competitive environment in power generation"). Respondent embraces this requirement, although it mistakenly asserts that the court found petitioner's complaint insufficient in this regard. BIO 8. In reality, as the petition repeatedly details but respondent ignores, the court of appeals acknowledged petitioner's allegations that respondent's activities reduced competition four different times. See Pet. 7-8; see also *id.* at 5 & nn.1-2 (collecting numerous examples from petitioner's complaint).

Third, the Sixth Circuit extended its holding that an antitrust plaintiff must allege that the defendant's activities reduced competition to *further* require that the plaintiff allege that the defendant's conduct harmed consumers. See Pet. 9-11. It was on this basis that the court found that petitioner had failed to allege "antitrust injury." See Pet. App. 6a ("Although antitrust actions may, of course, be initiated by marketplace competitors, those actors in the economic forum must at least allege that exclusion of the competitor from the marketplace results in the elimination of a superior product or a lower-cost alternative."; petitioner failed to allege "how General Motors itself was harmed or how other customers in the energy market suffered"), 8a ("Indeck has alleged only injury to itself * * * not injury to the customers").[3]

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[3] A perfect example of the Sixth Circuit's misguided approach to "antitrust injury" is its reasoning (on which respondent relies (BIO 8)) that the contracts between respondent and General Motors would not disrupt the long-term competitive environment for energy supplies. See Pet. App. 7a. The Sixth

3. The Sixth Circuit's decision conflicts not only with this Court's precedents (see *supra* at 1-2), but also with decisions of other circuits that would find "antitrust injury" in this case. See Pet. 22-29. Not even respondent disputes the core of the conflict: that other circuits do not require a plaintiff to allege anything other than that its injuries arise from the anticompetitive effects of the defendant's acts.

Respondent notes that in two cases "the Third Circuit found that antitrust injury *was absent*," but misstates the court's holding as resting on "the comprehensive regulatory framework in which both utilities operated." BIO 13-14 (emphasis in original). In reality, the Third Circuit found antitrust injury lacking not because the parties were "regulated" but because in those cases, unlike this one, the plaintiff and defendant were forbidden *by law* from competing *at all* and the only competitive restraint arose from the government's regulation rather than the defendants' conduct.[4] The decision below conflicts with the Third Circuit's precedents because that court has squarely rejected the Sixth Circuit's view that a plaintiff must allege that the defendant's conduct injured consumers, and indeed has rejected that view in cases involving regulated energy markets. See Pet. 22-23. Respondent's further argument (BIO 14) that *Angelico* v.

Circuit's description of the contracts is factually inaccurate (see Pet. App. 51a-52a (complaint)), but the relevant point is that its analysis has nothing to do with "antitrust injury" – *i.e.*, whether petitioner complains about an anticompetitive aspect of respondent's conduct. To the extent that the Sixth Circuit's point is relevant at all to this case, it goes to whether petitioner can prove the substance of its case, not preliminary issues such as injury and standing.

[4] See *City of Pittsburgh* v. *West Penn Power Co.*, 147 F.3d 256, 269 (CA3 1998) ("[I]t is the structure of the regulated industry, not the defendants' conduct, which creates the lack of competition – and under these facts – the lack of antitrust standing. That does not mean that utilities are immune from antitrust liability. * * * * Had the ability of the utilities to serve various customers in various regions not been subject to approval of the PUC, our standing analysis would be radically different."); *Schuykill Energy Resources* v. *Pennsylvania Power & Light Co.*, 113 F.3d 405, 415 (CA3) ("In addition to the fact that the Agreement on its face defeats SER's claim that it is PP&L's competitor, state and federal laws prohibit SER from competing in the relevant market."), *cert. denied*, 522 U.S. 977 (1997).

Lehigh Valley Hospital, 184 F.3d 268 (CA3 1999), is distinguishable because that case involved "a *per se* Sherman Act violation" has already been squarely rejected by this Court. See *Atlantic Richfield*, 495 U.S. at 343 ("The antitrust injury requirement ensures that a plaintiff can recover only if the loss stems from a competition-reducing aspect or effect of the defendant's behavior. The need for this showing is at least as great under the *per se* rule as under the rule of reason. * * * Thus, 'proof of a per se violation and of antitrust injury are distinct matters that must be shown independently.' P. Areeda & H. Hovenkamp, Antitrust Law para. 334.2c, p. 330 (1989 Sup.).").

Regarding the Seventh Circuit, respondent's argument (BIO 15) that the precedential force of *City of Mishawaka* v. *American Electric Power Co.*, 616 F.2d 976 (CA7 1980), has been "severely undermined" by a First Circuit decision that does not cite it and that addresses an entirely different issue (*Town of Concord* v. *Boston Edison Co.*, 915 F.2d 17 (CA1 1990)) speaks for itself. *Mishiwaka* stands for the proposition that a plaintiff asserts antitrust injury when its complaint alleges a price-squeeze claim in energy markets such as presented by this case. See Pet. 25. Nor does respondent even attempt to explain its erroneous argument regarding *Fishman* v. *Estate of Wirtz*, 807 F.2d 520 (CA7 1986), that the Seventh Circuit's holding the "antitrust injury" requirement does not mandate an allegation of *consumer* injury (in accord with the Third Circuit but in conflict with the Sixth Circuit) turned on the fact that the defendant in that case held a "natural monopoly."

Regarding the Eleventh Circuit, respondent would distinguish *Municipal Utilities Board of Albertville* v. *Alabama Power Co.*, 934 F.2d 1493 (CA11 1991), because that case (in supposed contrast to this one) did not involve "a complicated fact pattern where a utility charges government-approved rates and enters into government-approved rates and enters into government-approved purchase and sale agreements." BIO 19. We address *infra* at 6-7 the question whether this alleged regulatory environment is relevant given the procedural posture of this case (answer: no), but for now it is sufficient to point out that the Sixth Circuit did not rely *in any respect* on the distinctions re-

spondent purports to identify, which are not mentioned in either the background or analysis section of the decision below. Even giving respondent the full force of its argument (far more than it is due), not even the brief in opposition denies that the Sixth and Eleventh Circuits have adopted squarely conflicting decisions (with the resultant inconsistent applications of federal law) regarding whether a competitor must allege consumer injury in order to bring an antitrust claim. See Pet. 26-27.

4. Respondent's principal argument in opposition – that this case arises in a regulated environment (see BIO 1-10) – is irrelevant – so irrelevant that (a) the Sixth Circuit did not rely on it in any respect, (b) respondent did not make any such argument below, and (c) no other court has adopted it.[5]

Respondent does not contend that the regulatory proceedings it cites addressed whether its conduct complied with the federal antitrust laws, or even that the specific anticompetitive acts at issue here were approved by state officials. The relevant point for purposes of the "antitrust injury" requirement is that respondent admits that, notwithstanding that energy markets are regulated, petitioner and respondent compete to sell power to large industrial customers. See BIO 4 (acknowledging that "these large-load customers began to consider other sources for obtaining electricity" and "made it clear that they * * * would explore other options"). As such, petitioner has properly asserted "antitrust injury" so long as it seeks to recover for the anticompetitive aspects of respondent's actions, which it does. See *supra* at 1-2.

The precedents cited in the brief in opposition establish that the degree of government regulation relates to the question whether a defendant's activities are immune from liability as "state action" under the test of *California Retail Liquor Dealers*

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[5] To demonstrate that respondent did not make any such argument below, we are lodging the four-page section of respondent's court of appeals brief that defended the district court's antitrust injury holding. Of note, respondent expressly acknowledged that the singularly self-serving "affidavit" of its General Counsel (Mr. Mikelonis) was presented only as "a useful guide to the materials" presented to "establish its state action defense." Resp. C.A. Br. 41.

Ass'n v. *Midcal Aluminum Inc.*, 445 U.S. 97, 105 (1980) ("*Midcal*") (inquiry is whether (i) state policy is clearly articulated and (ii) state actively supervised challenged activities), not whether the plaintiff has alleged "antitrust injury." The courts consistently separate their "state action" and "antitrust injury" inquiries, and respondent is accordingly unable to cite any court finding that a regulated market (such as the energy market) is subject to a unique antitrust injury standard. See, *e.g.*, *Nugget Hydroelectric, L.P.* v. *Pacific Gas & Elec. Co.*, 981 F.2d 429, 435 (CA9 1992), *cert. denied*, 508 U.S. 908 (1993), *cited in* BIO 22; *Municipal Utils. Bd. of Albertville* v. *Alabama Power Co.*, 934 F.2d 1493, 1498-1505 (CA11 1991), *cited in* BIO 19; *Todorov* v. *DCH Healthcare Auth.*, 921 F.2d 1438, 1446-62 (CA11 1991), *cited in* BIO 19.

Respondent's related claim that certiorari is not warranted because it is entitled to prevail on the alternative ground of state action immunity is unfounded. The Sixth Circuit made clear that it was not reaching that question (Pet. App. 2a), which accordingly would remain open for consideration on remand. In any event, as the State Attorney General explained in her brief as an *amicus curiae* in the Sixth Circuit (lodged with this Reply), respondent cannot satisfy the *Midcal* inquiry on these facts.

5. Certiorari is furthermore warranted because the decision below, which has precedential force as a result of the Sixth Circuit's decision ordering publication, is of surpassing importance.

Respondent's seriously overstated claims regarding recent changes in the regulatory environment would not, even if true, render the Sixth Circuit's holding "academic." Contra BIO 24. That competition is expanding, not contracting, means that power monopolies will have more, not fewer, opportunities to leverage their entrenched control over inputs such as transmission facilities, as well as their high-volume purchases and sales of electricity. In the meantime, the fact that electricity customers pay rates fixed by regulation (see BIO 3) just heightens the importance of this case: the fact that changes in market conditions do not change consumers' costs means that an antitrust plaintiff *cannot* allege (as the Sixth Circuit required) that the

defendant's conduct causes consumer injury. Cf. Pet. 21 (providing example of competitors selling widgets at fixed price of $5 per unit). The decision below accordingly gives monopolists such as respondent a free pass to engage in anticompetitive acts.

Moreover, as detailed in the Michigan Attorney General's brief, the decision below comes at an *exceedingly* delicate point in the transition to competitive energy markets. See generally A.G. Br. 7-9. The Sixth Circuit nonetheless adopted an unprecedented standard for alleging antitrust injury, imposing a higher standard for alleging "antitrust injury" than for pleading the *substance* of petitioner's antitrust allegations (see Pet. 20-21), a point respondent notably never contests. By all but immunizing entrenched power monopolies from antitrust claims, the Sixth Circuit's decision presents a direct challenge to that transition by means that include creating a substantial deterrent to would-be market entrants. For it is federal antitrust law that provides the principal guarantee of fair market access as state public utility commissions withdraw from their regulatory role.[6]

Moreover, respondent ignores the fact that the Sixth Circuit's decision is not limited to the context of energy markets. The court broadly held that *any* plaintiff challenging its rival's activities under the antitrust laws must allege that the defendant's acts eliminated the plaintiff from competition, harmed competition generally, and harmed consumers as well. See *supra* at 3.

Certiorari accordingly should be granted to review the "antitrust injury" standard adopted by the Sixth Circuit.

II. Certiorari Should Be Granted to Review the Sixth Circuit's Antitrust Standing Holding.

This Court's precedents, consistently applied by other circuits, establish that petitioner has "antitrust standing" as a com-

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[6] Even if the Sixth Circuit's decision had been limited to petitioner's allegations regarding co-generation, it would have been of substantial importance. The decision directly undermines competition in the provision of energy to large industrial customers in several major industrial states within its jurisdiction, including Michigan, Ohio, and Kentucky.

petitor directly injured by respondent's anticompetitive acts. The conflict could not be more transparent, given that respondent does not deny or defend the Sixth Circuit's antitrust standing holding other than to repeat it by rote (see, *e.g.*, BIO 11 (asserting without explanation that petitioner's damages "were too indirect and speculative"), 21 (similar)) and does not deny the settled rule that a competitor is the *prototypical* antitrust plaintiff. See Pet. 16, 17-18 (citing, *inter alia*, *Associated Gen. Contractors of Cal.* v. *California State Council of Carpenters*, 459 U.S. 519, 539 (1983) (standing denied because plaintiff "was neither a consumer nor a competitor")), 28-29 (collecting decisions of other circuits). Nothing about petitioner's status renders "indirect" or "speculative" its claim that it was injured by respondent's anticompetitive refusals to deal and denials of access to essential facilities, or its "price-cost squeeze." The Sixth Circuit nonetheless held that petitioner lacked "antitrust standing" as to its claims involving respondent's contracts with General Motors. Pet. App. 6a.[7]

The Sixth Circuit's holding conflicts with the precedents of this Court and other circuits, and (as the petition noted and respondent apparently cannot deny) produces absurd results. For example, the court held that petitioner lacked antitrust standing because General Motors could bring a claim against respondent as a putative customer of petitioner. Pet. App. 6a. But that conclusion ignores the fact that General Motors would be prohibited from suing because it is an indirect purchaser (see Pet. 21-22), such that under the court of appeals' holding *no party* could sue. That, however, is not even the most extraordinary result of the

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[7] To the extent that the opinion below invokes "antitrust standing" in the context of petitioner's remaining claims, it is simply conflating that doctrine with "antitrust injury," a point respondent acknowledges. See BIO 10 ("the court correctly ruled that Indeck had failed to plead antitrust injury and therefore lacked antitrust standing"). This is just another in the Sixth Circuit's extensive arsenal of errors. See *Greater Rockford Energy & Tech. Corp.* v. *Shell Oil Co.*, 998 F.2d 391, 301 n.13 (CA7 1993) ("As noted, antitrust injury and antitrust standing involve two separate inquiries. The crux of the standing analysis is whether the plaintiff is the proper party to vindicate the antitrust interest."), *cert. denied*, 510 U.S. 1111 (1994).

Sixth Circuit's decision – an honor that falls to the court's holding (which respondent studiously ignores) that respondent, as its own customer in purchasing electricity from its own cogeneration affiliate, would police its own efforts to drive out petitioner. Pet. 19-20; see Pet. App. 8a ("unfair pricing or unfair treatment of a customer [here, respondent] will lead that consumer to investigate alternate vendors in future contractual dealings"; requiring allegation that "Consumers Energy paid above-market prices for excess power" as a result of its own anticompetitive acts). To deny petitioner standing on that basis is not just insupportable; it is scandalous.

The Sixth Circuit's antitrust standing holding thus not only conflicts with decisions of this Court and other circuits, but it also is of substantial importance. Even if the decision below does not have the effect of eliminating all possible antitrust plaintiffs, it still eliminates the most likely enforcers of the antitrust laws: competitors. Unlike competitors, "[c]onsumers may lack the expertise and experience necessary for detecting improper pricing by a utility's suppliers" and "might fail to enforce their claims because of the insignificance of their individual recoveries." *Kansas* v. *Utilicorp United*, 497 U.S. at 215-16. Particularly given the ongoing transition to competitive energy markets, where individual consumers have a relatively limited stake in marginal increases in their power rates, it is essential that this Court preserve the rights of plaintiffs to challenge the anticompetitive acts of their rivals.

Certiorari accordingly should be granted to review the Sixth Circuit's holding that, as to certain of its claims against respondent, petitioner lacks "antitrust standing."

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition and the brief of the Michigan Attorney General, the petition for a writ of certiorari should be granted and the case set for plenary consideration or the judgment should be summarily reversed.

Respectfully submitted,

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